STATEMENT OF NANCY S. BRYSON
GENERAL COUNSEL
U.S. DEPARTMENT OF AGRICULTURE
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON AGRICULTURE
JUNE 26, 2003

Introduction

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear before you today to discuss the mandatory country-of-origin labeling provisions, and the legal requirements which USDA must implement under this Farm Bill mandate. I am Nancy Bryson, General Counsel of the U.S. Department of Agriculture, and I am pleased to be here today.

Country-of-Origin Labeling

The Secretary of Agriculture is required to implement a mandatory country-of-origin labeling program commencing on September 30, 2004. From that date on, all "covered commodities" must be labeled with their country of origin at the final point of retail sale. In effect, the statute mandates that retailers must make a marketing claim informing consumers of the country of origin of each covered commodity.

At the outset, it is important to note that country-of-origin labeling must be viewed in the broad legal context of other kinds of marketing claims, since the country-of-origin label distinguishes a commodity from similar commodities with different country-of-origin characteristics. In general, marketing claims are made to provide consumers with information that has been determined to be useful or material to a purchasing decision by them. As such, their truthfulness and reliability is paramount, and the laws require those providing such information to be able to substantiate its accuracy. Health claims must be supported by scientific studies. Other kinds of claims must be substantiated with data and records that will enable an agency exercising oversight to verify the truthfulness of the claim. The usefulness to the consumer of the information contained in the marketing claim would be nullified if the accuracy of the claim cannot be independently audited and verified.

Statutory Requirements Applicable to Retailers and Others

The statute contains a number of very specific requirements, which USDA has no discretion to ignore or modify. Responsibility for making the country-of-origin marketing claim is placed upon the retailer by the statute, and USDA has no authority to adopt regulations that place that responsibility elsewhere. Additionally, the labeling of covered commodities of U.S. origin must meet highly specific statutory requirements that vary by commodity. For example, with respect to muscle cuts of beef, lamb, and pork, or ground meat made from them, the statute requires that the product be "exclusively from an animal that is exclusively born, raised, and slaughtered in the United States." To bear a U.S. country-of-origin label, wild fish must be either caught by a U.S. flagged vessel or caught in U.S. waters, and must be processed in the United States or aboard a U.S. flagged vessel. The retailer is required by the statute to make these claims, and USDA has no discretion to modify them. Furthermore, the statute does not authorize USDA to create a presumption that covered commodities are of U.S. origin if they are not claimed to be products of another country. Covered commodities cannot be assumed by default to be products of the United States.

The statute imposes an affirmative obligation on retailers to substantiate any claim of U.S. origin. How will the retailer obtain the information necessary for it to make this statutorily required marketing claim? The statute mandates that "any person engaged in the business of supplying a covered commodity to a retailer shall provide information to the retailer indicating the country of origin of the covered commodity." With respect to beef, lamb, and pork of U.S. origin, the information must be sufficient to substantiate the statutorily mandated claim that the animal was born, raised, and slaughtered in the United States.

An issue created by the statutory language is that the term "covered commodities" does not include livestock, but much of the information that retailers must have to meet their statutory burden of verifying and labeling country of origin can only be obtained from producers and handlers of livestock. However, USDA is not authorized by the statute to require them to provide the necessary information to packers and retailers.

It has been suggested that USDA could provide for a self-certification program, under which

those who produce livestock could merely certify to packers and others who supply covered commodities to retailers that the livestock is born and raised in the United States. However, it is clear from the statute as a whole that self-certification by producers would not provide an adequate basis for those who supply covered commodities to retailers to substantiate the truthfulness of the information. Therefore, the retailer would not be able to verify and make the country-of-origin claim. Unless a country-of-origin claim can be independently verified, it will not provide consumers with reliable information that the Congress has determined that consumers want and need.

USDA Responsibilities Under the Statute

The statute authorizes USDA to require that "any person that prepares, stores, handles, or distributes a covered commodity for retail sale maintain a verifiable record keeping audit trail that will permit the Secretary to verify compliance . . . ." Additionally, the statute requires that, if the Secretary determines that a retailer has violated its provisions, the Secretary shall provide the retailer with notification of the determination, and a 30-day period to achieve compliance. The statute also provides authority for USDA to fine retailers up to $10,000 for each willful violation after providing notice and an opportunity for a hearing. Other statutory provisions incorporated in the country-of-origin labeling law allow the Secretary to take enforcement action against those who supply covered commodities to retailers.

Although the Secretary's authority to impose specific regulations requiring a verifiable record keeping audit trail is discretionary, it is clear from the statute as a whole that a retailer must be able to substantiate the country-of-origin labeling claim that the statute requires the retailer to make, even absent a regulation requiring the retailer to do so.

The statute provides USDA with guidance on how to verify the country of origin of a covered commodity by citing several existing certification programs as models. Those programs include carcass grading and certification, voluntary country-of-origin beef labeling, voluntary certification of certain premium beef cuts, and origin verification systems carried out under the

National School Lunch Act and the Agricultural Trade Act of 1978. It is important to note that all of these certification programs include record-keeping requirements that enable the agency to verify the accuracy of the claim.

Applicability of Other Laws to Country-of-Origin Labeling Claims

The country-of-origin labeling provisions require retailers to make specific marketing claims in the mandatory labeling of covered commodities. The truthfulness of these claims will have implications under other statutory authorities. For example, claims as to covered commodities subject to the Perishable Agricultural Commodities Act will be scrutinized for truthfulness under the provisions of that law. Mandated labeling claims regarding beef, lamb, and pork will also be subject to the labeling provisions of the Federal Meat Inspection Act. The Food and Drug Administration and the Federal Trade Commission may take action under their statutory authority over these claims as well. Finally, misrepresentation of country of origin may also give rise to third-party civil actions by competitors for injunctive relief and monetary damages under the Lanham Act.

Conclusion

Mr. Chairman, the country-of-origin labeling law requires USDA to implement a program for a wide range of food products. The Office of the General Counsel is working closely with the Agricultural Marketing Service as it designs and implements a program that faithfully carries out the provisions that Congress has incorporated in this statute. I believe that USDA is carrying out its obligations fully in accordance with the law, and is working to develop a regulatory program that is no more onerous than that which the law requires.

I am grateful for the opportunity to appear before you this morning and I will be happy to answer any questions from you or other members of the Committee.